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No. 1061

In the Supreme Court of the United States

OCTOBER TERM, 1956

MILTON J. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. Appendix A1–11) is reported at 243 F. 2d 74.

JURISDICTION

The judgment of the Court of Appeals was entered April 9, 1957 (R. 256), and a petition for rehearing was denied on May 8, 1957 (R. 275). Petition for a writ of certiorari was filed June 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment, which alleged a willful attempt to evade and defeat taxes by filing a false

return, was sufficient to charge an offense under Section 145 (b).

2. Whether the Government's evidence was sufficient to establish a willful attempt to evade and defeat taxes.

3. Whether petitioner was prejudiced by the trial court's statement to the jury that it could recommend as to sentencing, which statement petitioner later approved.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

STATEMENT

On February 27, 1953, petitioner was indicted in the United States District Court for the Southern Dis-

evade and defeat a large part of his income tax for the year 1946 by filing a fraudulent return in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment charged that a net loss of $4,839.47 and no tax due was reported on the petitioner's return for the year 1946 whereas his net income was $26,277.23 on which $9,797.89 in tax was due. (R. 1.) On April 3, 1956, after a jury trial, petitioner was found guilty as charged (R. 215–217), and was subsequently sentenced to six months' imprisonment and fined $2,000. (R. 218–219.)

The evidence to support the verdict may briefly be summarized as follows:

Petitioner is an attorney and real estate broker. (R. 30, 57, 177.) He was also president and sole owner of the M. J. Harris Company, an Ohio corporation. (R. 59, 118–123.) In the summer of 1946, he told Revenue Agent Nisenson that he had not filed personal income tax returns for many years. He said that his corporation paid all his personal expenses, and that he had been informed by a previous internal revenue examiner that it was therefore unnecessary for him to file personal returns. Agent Nisenson explained that he had been misinformed, and that he was required to file personal returns. (R. 54, 58–59.)

In October, 1946, petitioner personally received a commission of $45,000 on the sale of a hotel in Florida, and he applied this sum immediately on the purchase of a house in Miami Beach in the names of his wife and himself. (R. 32–35.) In March, 1947, he filed a personal income tax return in Florida, which failed to include the $45,000 commission, and which reported

a net loss with no tax due.[1] (R. 1, 100, 113, 168; Pet. 6.). The commission was, however, reported as the only item of income in the corporation's return, which was filed in Cleveland, Ohio, but it was completely offset by approximately $50,000 in deductible expenditures and by losses carried over from previous years. (R. 30, 174–175; Pet. App. 3.) There was no substantial evidence to indicate that the $45,000 was income to the corporation rather than to petitioner personally.

As further evidence of petitioner's intent to evade taxes, the Government showed that he had claimed expenses amounting to $17,605 on the corporate return, and had then claimed these same expenses as business deductions on his individual return. (R. 97–99.) There was also evidence that numerous purely personal non-deductible expenditures had been claimed on the return as business deductions. (R. 71–72, 137–141, 170–171.)

ARGUMENT

1. Petitioner contends (Pet. 2, 8–13) that the indictment, which charged that he had willfully attempted to evade and defeat his income taxes for 1946 by filing a false and fraudulent income tax return, failed to state an offense within the purview of Section 145 (b), Internal Revenue Code of 1939 (*supra*, p. 2). This contention has been completely disposed of by the recent

[1] The return also stated that petitioner's return for the previous year had been filed in Cleveland, Ohio (R. 168–169), although petitioner had admitted to Agent Nisenson that he had not filed personal returns for years (R. 59).

decision of this Court in *Achilli* v. *United States*, Nos. 430 and 834, this Term, decided May 27, 1957.

2. Equally without merit is the contention (Pet. 3, 13–21) that the Government's evidence failed to establish a willful attempt to evade taxes because the $45,000 commission fee had actually been revealed in the corporation's return. It is true that the fee was reported in the corporate return, which was filed in Ohio, but it was so completely offset there by deductions and losses that no tax appeared to be due. The fee was not reported, as it should have been, in the individual return which was filed in Florida. The result was that petitioner evaded payment of taxes on the $45,000 fee entirely. The jury could reasonably conclude that the revelation in the corporate return was designed to conceal the fact that a considerable amount of taxes was due on the individual return. As the trial judge put it (R. 109), "* * * the man was hiding behind the corporation to avoid paying taxes, * * *". Moreover, there was additional evidence of fraudulent intent in the duplication of deductions and in the misrepresentation of personal expenditures as business deductions (*supra*, p. 4). We submit that the element of willful intent to evade taxes was fully substantiated.

3. Finally, petitioner urges that the trial court induced the jury to find against him by permitting it to make a recommendation as to the sentence. (Pet. 21.) This contention is not supported by the record.

After the jury had been deliberating for over an hour, it requested that it be advised if a "verdict of

guilty without willful intent" could be returned. The trial court properly instructed that, "If there is no willful intent you cannot find him guilty," and added, "You can recommend as to sentence if you want to, but beyond that you cannot do anything." (R. 191.) Petitioner made no objection to this instruction. The following day the trial court again twice gave elaborate instructions on willfulness and other elements of the offense, first at the request of the jury as a whole, and later in response to an individual juror's question. (R. 192–210.) At no time did petitioner request an instruction to correct the remark he now contends induced the verdict. On the contrary, he objected to the Government's suggestion that the jury be instructed that it had no concern with the sentence, stating that "a reduced sentence might reasonably be indicated." (R. 210.) The jury ultimately returned its verdict twenty-three hours after the remark which had allegedly induced the result. (R. 215–216.)

We submit that under these circumstances the verdict was clearly not the result of the trial judge's remark. There was nothing said to indicate that a recommendation of leniency would be acted upon by the judge. The cases upon which petitioner relies are readily distinguishable. In *Demetree* v. *United States*, 207 F. 2d 892, 895 (C. A. 5th), the jury, after informing the judge that they were deadlocked, received some assurance that the punishment would be lenient. And in *Smith* v. *United States*, 230 F. 2d 935 (C. A. 6th), the trial judge's comment obviously led the jury to believe that a lenient sentence would be

imposed. Furthermore, petitioner is in no position to invoke the plain error rule since he affirmatively defended the jury's right to make a recommendation in the face of the Government's request for an instruction that the jury should not concern itself with the sentence. See *Strauch* v. *United States*, 213 F. 2d 805, 808 (C. A. 6th), certiorari denied, 350 U. S. 836.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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